

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TUG CONSTRUCTION, LLC, a
Washington limited liability company,

Plaintiff,

v.

HARLEY MARINE FINANCING, LLC, a
Delaware limited liability company,

Defendants.

IN ADMIRALTY

Case No.

COMPLAINT FOR BREACH OF
BAREBOAT CHARTER CONTRACTS

COMES NOW Plaintiff Tug Construction, LLC, and for cause of action against Defendant for the breach of maritime charter contracts with respect to the vessels DR HANK KAPLAN (Official No.1266463), EARL W REDD (Official No. 1273621), LELA FRANCO (Official No. 1258229), MICHELLE SLOAN (Official No. 1258228), RICH PADDEN (Official No. 1266462) (collectively, the “Tug Boats”), alleges as follows:

I. PARTIES, JURISDICTION, AND VENUE

1. Plaintiff Tug Construction, LLC (“Tug Construction” or “Plaintiff”), is a Washington limited liability company with its principal place of business located in Seattle, Washington. All of the Tug Boats are owned by Tug Construction.

1 2. Defendant Harley Marine Financing, LLC (“Harley Marine” or “Defendant”), is a
2 Delaware limited liability company with its principal place of business located in Seattle,
3 Washington.

4 3. Tug Construction’s claims are based on Harley Marine’s breach of Tug
5 Construction’s Bareboat Charter agreements with Harley Marine for the Tug Boats. All five
6 Bareboat Charter agreements mandate that any suit relating to the charter must be filed in Seattle,
7 Washington. Venue in this district is proper under 28 U.S.C. § 1391(b), and the general maritime
8 law.

9 4. This Court has jurisdiction over vessel charter agreement disputes pursuant to 28
10 U.S.C. § 1333, and because such disputes are admiralty and maritime claims within the meaning
11 of Fed. R. Civ. P. 9(h).

12 II. FACTUAL ALLEGATIONS

13 5. Tug Construction is the documented owner of the tug boats: DR HANK
14 KAPLAN (Official No.1266463); EARL W REDD (Official No. 1273621); LELA FRANCO
15 (Official No. 1258229); MICHELLE SLOAN (Official No. 1258228); and, T/B RICH PADDEN
16 (Official No. 1266462).

17 4. On or about March 27, 2015, Tug Construction chartered the MICHELLE
18 SLOAN to Millennium Maritime Inc. under a continuing Bareboat Charter agreement,
19 terminable at will by either party. Upon information and belief, on or about December 8, 2017,
20 Millennium Maritime Inc. assigned its rights and obligations under the Bareboat Charter for the
21 MICHELLE SLOAN to Harley Marine, and Harley Marine assumed all of the charterer’s rights
22 and obligations under the Bareboat Charter. A true and correct copy of the Bareboat Charter
23 agreement for the MICHELLE SLOAN and Tug Construction’s consent to the assignment are
24 attached hereto as **Exhibit A**. Under the terms of the subject Bareboat Charter agreement,
25 payment of charter hire is due in advance on the first day of the month in the amount of
26

\$63,753.33 per month, and sums not paid shall accrue interest at the rate of one percent (1%) per month.

5. On or about June 19, 2015, Tug Construction chartered the LELA FRANCO to Millennium Maritime Inc. under a continuing Bareboat Charter agreement, terminable at will by either party. Upon information and belief, on or about December 8, 2017, Millennium Maritime Inc. assigned its rights and obligations under the Bareboat Charter for the LELA FRANCO to Harley Marine, and Harley Marine assumed all of the charterer's rights and obligations under the Bareboat Charter. A true and correct copy of the Bareboat Charter agreement for the LELA FRANCO and Tug Construction's consent to the assignment are attached hereto as **Exhibit B**. Under the terms of the subject Bareboat Charter agreement, payment of charter hire is due in advance on the first day of the month in the amount of \$63,753.33 per month, and sums not paid shall accrue interest at the rate of one percent (1%) per month.

6. On or about January 30, 2017, Tug Construction chartered the EARL W REDD to Olympic Tug & Barge, Inc. under a continuing Bareboat Charter agreement, terminable at will by either party. Upon information and belief, on or about December 12, 2017, Olympic Tug & Barge, Inc. assigned its rights and obligations under the Bareboat Charter for the EARL W REDD to Harley Marine, and Harley Marine assumed all of the charterer's rights and obligations under the Bareboat Charter. A true and correct copy of the Bareboat Charter agreement for the EARL W REDD and Tug Construction's consent to the assignment are attached hereto as **Exhibit C**. Under the terms of the subject Bareboat Charter agreement, payment of charter hire is due in advance on the first day of the month in the amount of \$110,416 per month, and sums not paid shall accrue interest at the rate of one percent (1%) per month.

7. On or about June 9, 2017, Tug Construction chartered the DR HANK KAPLAN to SMS PNW under a continuing Bareboat Charter agreement, terminable at will by either party. Upon information and belief, on or about December 8, 2017, SMS PNW assigned its rights and obligations under the Bareboat Charter for the DR HANK KAPLAN to Harley Marine, and

1 Harley Marine assumed all of the charterer's rights and obligations under the Bareboat Charter.
2 A true and correct copy of the Bareboat Charter agreement and Tug Construction's consent to
3 the assignment are attached hereto as **Exhibit D**. Under the terms of the subject Bareboat
4 Charter agreement, payment of charter hire is due in advance on the first day of the month in the
5 amount of \$84,692 per month, and sums not paid shall accrue interest at the rate of one percent
6 (1%) per month.

7 8. On or about October 25, 2017, Tug Construction chartered the RICH PADDEN to
8 Starlight Marine Services PNW, Inc. under a continuing Bareboat Charter agreement, terminable
9 at will by either party. Upon information and belief, on or about February 5, 2018, Starlight
10 Marine Services PNW, Inc. assigned its rights and obligations under the Bareboat Charter for the
11 RICH PADDEN to Harley Marine, and Harley Marine assumed all of the charterer's rights and
12 obligations under the Bareboat Charter. A true and correct copy of the Bareboat Charter
13 agreement for the RICH PADDEN and Tug Construction's consent to the assignment are
14 attached hereto as **Exhibit E**. Under the terms of the subject Bareboat Charter agreement,
15 payment of charter hire is due in advance on the first day of the month in the amount of \$84,692
16 per month, and sums not paid shall accrue interest at the rate of one percent (1%) per month.

17 9. On or about January 3, 2019, Harley Marine provided Tug Construction with
18 written notice of its intent to terminate the Bareboat Charter for the DR HANK KAPLAN with
19 redelivery to occur on or about January 31, 2019. A true and correct copy of the notice is
20 attached hereto as **Exhibit F**.

21 10. On or about January 3, 2019, Harley Marine provided Tug Construction with
22 written notice of its intent to terminate the Bareboat Charter for the EARL W REDD, with the
23 date of redelivery of the vessel to be determined. A true and correct copy of the notice is
24 attached hereto as **Exhibit G**.

25 11. Harley Marine tendered redelivery of the DR HANK KAPLAN at the Harley
26 Marine facility in Seattle, Washington on February 1, 2019. The vessel was initially delivered to

1 Harley Marine in Portland, Oregon, and Tug Construction could have required redelivery of the
2 vessel in Portland. However, as an accommodation to Harley Marine and at its request, Tug
3 Construction agreed to accept redelivery at a place to be agreed in Seattle, Washington, where
4 the tug was then located. However, thereafter, Harley Marine unreasonably refused to discuss
5 the place of redelivery and simply notified Tug Construction that the DR. HANK KAPLAN
6 would be available on January 31, 2019 at the Harley Marine facility in Seattle, Washington. As
7 a result, upon Harley Marine's tender of redelivery of the DR HANK KAPLAN, Tug
8 Construction incurred the extraordinary expense to tow the tug to a shipyard facility within the
9 Port of Seattle in order to properly inspect the vessel.

10 12. As provided by the Bareboat Charter for the DR HANK KAPLAN, Harley
11 Marine and Tug Construction also agreed as to the marine surveyor that would be the person
12 who would conduct the "off-hire" (redelivery) survey of the vessel. The parties agreed that Mr.
13 William Kelley would conduct the off-hire survey. After arrangements were made for Mr.
14 Kelley to perform the off-hire survey, Harley Marine refused to proceed with Mr. Kelley -
15 performing the off-hire survey, and instead appointed its own surveyor to perform a separate off-
16 hire survey. Plaintiff then separately engaged Mr. Kelley to proceed with the survey of the
17 vessel. Upon inspection of the condition of the DR HANK KAPLAN upon tender of redelivery
18 by Harley Marine, Mr. Kelley found that the condition of the vessel was not in compliance with
19 the requirements of the Bareboat Charter and that Harley Marine had not fulfilled its obligations
20 with respect to maintenance and repair of the vessel.

21 13. With respect to the EARL W REDD, Harley Marine eventually advised that,
22 pursuant to its January 3, 2019 notice of Bareboat Charter termination, the redelivery date for the
23 EARL W REDD would be February 28, 2019. As it did with respect to the DR. HANK
24 KAPLAN, Harley Marine reneged on its earlier agreement to use William Kelley as the joint off-
25 hire surveyor and unreasonably refused to redeliver the vessel anywhere other than at the Harley
26 Marine facility in Seattle, Washington. As a result, Tug Construction incurred the extraordinary

1 expense to tow the tug to a shipyard facility within the Port of Seattle in order to properly inspect
2 it. As it had done with the DR HANK KAPLAN, Tug Construction separately engaged Mr.
3 Kelley to proceed with the survey of the vessel. Upon inspection of the condition of the EARL
4 W REDD upon tender of redelivery by Harley Marine, Mr. Kelley found that the condition of the
5 vessel was not in compliance with the requirements of the Bareboat Charter and that Harley
6 Marine had not fulfilled its obligations with respect to maintenance and repair of the vessel.

7 12. Tug Construction learned of Harley Marine's plans to terminate the Bareboat
8 Charters or the remaining three tugs and inquired more than once of its counsel what Harley
9 Marine's charter termination plans were for those vessels so that Tug Construction could plan the
10 vessels' next use. Harley Marine's counsel did not timely respond to Tug Construction's queries
11 about its plans for termination of the Bareboat Charters, but eventually wrote that Harley Marine
12 would "certainly attempt to work with" Tug Construction on the vessels' return. When Harley
13 Marine continued to refuse to provide any further information about its plans for terminating the
14 remaining charters and return of the tugs, and after seeing the condition of the DR. HANK
15 KAPLAN upon tender of redelivery, Tug Construction elected to terminate the remaining
16 Bareboat Charters. On February 12, 2019, Tug Construction, by and through its attorneys,
17 provided Harley Marine with notice of the termination of the Bareboat Charter agreements for
18 the tugs RICH PADDEN, MICHELLE SLOAN and LELA FRANCO, effective as of February
19 28, 2019, a copy of which notice is attached hereto as **Exhibit H**.

20 13. In addition to agreeing to redeliver the EARL W. REDD on February 28, 2019,
21 Harley Marine agreed to redeliver two of the tugs whose charters Tug Construction terminated,
22 the RICH PADDEN and the MICHELLE SLOAN, by February 28, 2019. Harley Marine again
23 unreasonably refused to redeliver the tugs at any location other than at Harley Marine's facility
24 in Seattle, Washington. As a result, Tug Construction incurred the extraordinary expense to tow
25 the two tugs to a shipyard facility within the Port of Seattle in order to properly inspect the
26 vessels. Harley Marine also refused to proceed to appoint a joint off-hire surveyor as required by

1 the Bareboat Charters for the RICH PADDEN and the MICHELLE SLOAN. Accordingly, as it
2 had for the other vessels, Tug Construction separately engaged Mr. Kelley to proceed with the
3 survey of the two vessels. Upon inspection of the condition of the RICH PADDEN and the
4 MICHELLE SLOAN upon tender of redelivery by Harley Marine, Mr. Kelley found that the
5 condition of the vessels was not in compliance with the requirements of the relevant Bareboat
6 Charters and that Harley Marine had not fulfilled its obligations with respect to maintenance and
7 repair of the vessels.

8 14. Harley Marine initially refused to redeliver the tug LELA FRANCO to Tug
9 Construction on February 28, 2019 as required by the notice of termination of its Bareboat
10 Charter, but later agreed to redeliver the LELA FRANCO in the Port of Los Angeles, California,
11 on March 8, 2019. The vessel was initially delivered to Harley Marine in Portland, Oregon, and
12 Tug Construction could have required redelivery of the vessel in Portland. However, as an
13 accommodation to Harley Marine and at its request, Tug Construction agreed to accept
14 redelivery at a place to be agreed in the Port of Los Angeles, California, where the tug was then
15 located. Harley Marine thereafter refused to redeliver the LELA FRANCO on March 8, 2019 as
16 previously promised, and refused to advise as to when it would redeliver the tug. Accordingly,
17 on March 21, 2019, after advising counsel for Harley Marine it would seek to judicially recover
18 the vessel if Harley Marine did not promptly advise of its plans and redeliver it, Tug
19 Construction commenced a possessory action against the LELA FRANCO and Harley Marine
20 under Rule D of the Supplemental Rules for Certain Admiralty and Maritime Claims before the
21 United States District Court for the Central District of California, Case No. 2:19-cv-02134-
22 SVW-E, to regain possession of its tug. The tug was duly arrested by the United States Marshal,
23 and was delivered by the U.S. Marshal to Tug Construction on April 3, 2019.

24 15. Upon recovering possession of the LELA FRANCO, marine surveyor William
25 Kelley inspected the vessel and found that the vessel had not been properly maintained, and was
26 not in the condition required for redelivery under the Bareboat Charter pertaining to the vessel.

1 16 Under the Bareboat Charter agreements for each of the Tug Boats, Harley Marine
 2 was under a duty to properly maintain the Tug Boats throughout the terms of the agreements.
 3 Section 5 of the Bareboat Charter agreements for each of the Tug Boats provides as follows:

4 5. REPAIRS, MAINTENANCE AND ALTERATIONS

5 Charterer shall make all repairs, replacements and maintenance necessary
 6 to keep the Vessel in the same good condition, repair and working order as
 7 when delivered, less normal wear and tear (which does not include any
 8 damage or deterioration correctible through routine maintenance). Charterer
 9 shall not install any gear or equipment on or make any alterations or
 10 additions to the Vessel without Owner's prior written consent. Any
 11 additional gear, equipment, alterations or additions allowed by Owner shall
 12 be Charterer's property and removed at Charterer's expense prior to
 13 redelivery. (Emphasis Added).

14 17. Each of the Tug Boats had been delivered to Harley Marine as a
 15 newly constructed vessel, and had been accepted by Harley Marine as such.

16 18. Upon termination of the Bareboat Charters, Harley Marine was under a duty to
 17 redeliver each of the Tug Boats to Tug Construction in the same condition as upon delivery to
 18 Harley Marine at the commencement of each Bareboat Charter, less ordinary wear and tear.
 19 Section 6 of the Bareboat Charter agreements for each of the Tug Boats provides as follows:

20 6. SURVEYS; DELIVERY AND REDELIVERY

21 Prior to or at delivery, the Vessel shall be surveyed to
 22 comprehensively document its condition. The parties may agree
 23 upon an appropriate method by which to survey the Vessel and
 24 establish its condition, including drydocking and/or underwater
 25 inspection, but any method agreed must include written and
 26 photographic documentation.

At the conclusion of the charter term (or sooner, at the Owners'
 option in the event of default), an off-hire survey of the Vessel shall
 be conducted upon the same method utilized for the on-hire survey,
 to establish the condition of the Vessel for redelivery. Every effort

shall be made to have the off-hire survey conducted by the same person who conducted the on-hire survey.

The Vessel shall not be deemed redelivered until at the agreed redelivery location and in the same good condition, repair and working order as upon delivery, less ordinary wear and tear. If Charterer tenders the Vessel damaged and/or in need of repair, hire shall continue during the time required for such repairs and the Vessel shall not be deemed redelivered until restored to the same good condition, repair and working order as upon delivery, less ordinary wear and tear.

(Emphasis added)

19. As previously stated, the off-hire surveys conducted by Mr. Kelley found that each of the Tug Boats had not been tendered for redelivery by Harley Marine to Tug Construction in the condition required under the Bareboat Charter agreements for each of the Tug Boats, and that significant repairs and drydocking were required to bring each of the Tug Boats into the condition required under the Bareboat Charter agreements for completion of redelivery.

20. On or about March 16, 2019, counsel for Tug Construction notified counsel for Harley Marine in writing of the off-hire survey results found by Mr. Kelley with respect to the tugs DR HANK KAPLAN, MICHELLE SLOAN, RICH PADDEN, and EARL W REDD, and notified Harley Marine that it was in breach of its obligations under the Bareboat Charter agreements for each of the vessels. The notices further notified Harley Marine that it was welcome to inspect the deficient conditions found on the vessels, that Harley Marine's obligation to pay charter hire would continue until the subject vessels were brought to the proper condition, and that Tug Construction would pursue the necessary repairs with reasonable diligence. True and correct copies of the referenced notices to Harley Marine for each vessel, along with Mr. Kelley's survey reports for each vessel, are attached hereto as **Exhibit I** and incorporated herein by reference.

21. On or about April 25, 2019, counsel for Tug Construction notified counsel for Harley Marine in writing of the off-hire survey results found by Mr. Kelley with respect to the tug LELA FRANCO, and notified Harley Marine that it was in breach of its obligations under the Bareboat Charter agreements for the LELA FRANCO. The notice further notified Harley Marine that Harley Marine's obligation to pay charter hire would continue until the LELA FRANCO was brought to the proper condition, and that Tug Construction was pursuing the necessary repairs with reasonable diligence. True and correct copies of the referenced notice to Harley Marine relating to the LELA FRANCO, along with Mr. Kelley's survey report for the vessel, are attached hereto as **Exhibit J** and incorporated herein by reference.

22. For its part, Harley Marine disputes the findings of Tug Construction's off-hire surveys, asserts there were no deficiencies in the condition of the Tug Boats upon tender of redelivery, and has refused to pay for any repairs or continuing charter hire.

23. Section 2 of the Bareboat Charters for each of the Tug Boats provides in pertinent part as follows:

Charterer shall pay hire, at the rate identified above, from delivery until redelivery, with payment due monthly in advance on the first day of each month unless otherwise agreed.

...

Amounts due Owner shall be paid in US currency without discount or set-off; sums due but not paid shall accrue interest at the rate of one percent (1%) per month.

...

24. Harley Marine failed to pay charter hire due for the tug DR HANK KAPLAN for the months of February, March and April 2019 in the principal amount of \$254,076. On March 21, 2019 Tug Construction applied an unidentified payment received from HMF in the amount of \$63,753.33 to the account due for charter hire for the DR HANK KAPLAN, reducing the balance due on the account to \$190,322.67.

25. Harley Marine failed to pay charter hire due for the tug MICHELLE SLOAN for the months of March and April 2019 in the principal amount of \$127,506.66.

1 26. Harley Marine failed to pay charter hire due for the tug LELA FRANCO for the
2 month of April 2019 in the principal amount of \$63,753.33.

3 27. Harley Marine failed to pay charter hire due for the tug EARL W. REDD for the
4 months of March and April 2019 in the principal amount of \$220,832.

5 28. Harley Marine failed to pay charter hire due for the tug RICH PADDEN for the
6 months of March and April 2019 in the principal amount of \$169,384.

7 29. Tug Construction has and will continue to incur costs to effect maintenance and
8 repairs to the Tug Boats required to put the Tug Boats into the condition that was required for
9 redelivery under the Bareboat Charter agreements, all in amounts to be proven at trial.

10 30. Section 9(d) of the Bareboat Charter agreements for each of the Tug Boats,
11 provides as follows:

12 Law; Venue; Legal Fees. This agreement shall be governed by the general
13 maritime law of the United States or, in the absence of an applicable general
14 maritime rule of law, by the laws of the State of Washington. Any suit relating to
this agreement must be filed in Seattle, Washington, with the substantially
prevailing party to recover its legal fees and costs.

15 **III. CAUSES OF ACTION**

16 **BREACH OF BAREBOAT CHARTERS**

17 31. Tug Construction incorporates by reference the allegations set forth in the
18 preceding paragraphs as if fully stated herein.

19 32. Harley Marine was, and is, bound by the terms and conditions of the Bareboat
20 Charter agreements for the Tug Boats at issue.

21 33. Harley Marine has breached the terms of the Bareboat Charter agreements for
22 each of the Tug Boats by, amongst other actions, failing to properly maintain and repair the Tug
23 Boats during the terms of their respective Bareboat Charters, failing to return the Tug Boats in
24 the proper condition, failing to pay for necessary repairs to the Tug Boats to bring them into the
25 condition required for their redelivery, and failing to pay continuing charter hire accruing until
26 the Tug Boats were/are brought into the condition required for their redelivery.

34. As a result of Harley Marine's breaches of the Bareboat Charter agreements, Tug Construction has suffered harm in amounts to be proven at trial.

IV. PRAYER FOR RELIEF

WHEREFORE, Plaintiff Tug Construction prays for relief from this Honorable Court as follows:

- A. Judgment against Defendant, in an amount to be proven at trial;
- B. An award of Plaintiff's legal fees and costs;
- C. An award of pre- and post-judgment interest at 12% per annum, as provided by the Bareboat Charters; and
- D. Any and all further relief the Court deems fair and equitable;

DATED this 29th day of April, 2019.

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